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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

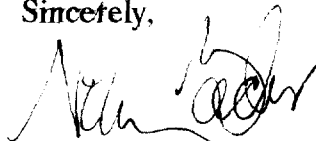
February 27, 1997

Dear Mr. Caton:

Enclosed for filing please find the original and eleven copies of the Comments of the Greater Metro Telecommunications Consortium and the National Association of Telecommunications Officers and Advisors in the Closed Captioning Notice of Proposed Rulemaking issued January 17, 1997. I have enclosed a copy on diskette in WordPerfect 6.0 to facilitate electronic access to the filing.

Please let me know if you need any further information. Thank you for your time and attention in this matter.

Sincerely,



Norman B. Beecher

c: GMCC Boardmembers
NATOA Boardmembers

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Closed Captioning and Video
Description of Video Programming

Implementation of Section 305
of the Telecommunications Act of 1996

Video Programming Accessibility

MM Docket No. 95-176

**COMMENTS OF THE GREATER METRO
TELECOMMUNICATIONS CONSORTIUM
AND
THE NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS AND ADVISORS**

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February 26, 1997

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**COMMENTS OF THE GREATER METRO
TELECOMMUNICATIONS CONSORTIUM,
AND
THE NATIONAL ASSOCIATION
TELECOMMUNICATIONS OFFICERS AND ADVISORS**

The Greater Metro Telecommunications Consortium ("GMTC" or the "Consortium"), and the National Association of Telecommunications Officers and Advisors ("NATOA") by their attorneys, and on behalf of their members, respectfully submit these comments in the above-captioned proceedings pursuant to the Notice of Proposed Rulemaking (the "NPRM") released by the Federal Communications Commission (the "Commission," or "FCC") on January 17, 1997.

I. INTRODUCTION.

In the NPRM, the Commission proposes rules and implementation schedules for closed captioning under Section 713 of the Telecommunications Act of 1996, and seeks input as to how

to allocate responsibility for compliance with closed captioning mandates, which, if any, programming to exempt from such mandates, and how to interpret the statutory standards of "economic burden" and "undue burden."

The Greater Metro Telecommunications Consortium is a joint agency of its Member jurisdictions, 24 local subdivisions of the State of Colorado in the greater metropolitan Denver area.¹ The Consortium was formed in 1992 by intergovernmental agreement for the purposes of cooperating and sharing information regarding, the administration, management, and regulation of communication and information systems and services. Most of the GMTC's Members manage public, educational or governmental ("PEG") entities on behalf of their constituencies.

The National Association of Telecommunications Officers and Advisors is the principal nonprofit organization in the country devoted solely to serving and assisting local governments and regional authorities on cable and telecommunications matters. NATOA is made up of individuals and organizations responsible for telecommunications policies and services in local governments and regional authorities, many of which manage PEG entities on behalf of their communities.

¹ The Members of the Consortium include the Cities or Towns of Arvada, Aurora, Castle Rock, Cherry Hills Village, Commerce City, Englewood, Edgewater, Glendale, Golden, Greenwood Village, Lafayette, Lakewood, Littleton, Northglenn, Parker, Sheridan, Superior, Thornton, Westminster and Wheat Ridge, the City and County of Denver, and Adams and Douglas Counties.

II. SUMMARY

The GMTC and NATOA support the goal of making video programming accessible to those with hearing disabilities. The mission of PEG entities is to provide local video programming produced by, and for, their communities. Local PEG programming serves as a means for airing information of local concern, addressing community affairs, and educating the public about government and other issues. In this sense, GMTC and NATOA Member interests are completely consistent with Congress' intent in enacting the Communications Act of 1934 generally, and Section 713 of the Telecommunications Act of 1996 in particular.

Indeed, as developers of local PEG programming, the GMTC and NATOA applaud the Commission for recognizing its "high public interest value."² We produce and provide local PEG programming on a noncommercial, equal access and cost-free basis because it is an effective way to present important governmental, educational and community information to all segments of our communities. This includes many we might otherwise not reach, such as the elderly, the disabled, the developmentally disabled, and the hearing impaired. The *raison d'être* of GMTC Member programming services coincides with Section 713's purpose as annunciated by the Commission (quoting legislative history), of ensuring "that all members of our communities ultimately have access to video services and programs, particularly as video programming becomes an increasingly important part of the home, school and workplace."³

². NPRM, ¶ 74.

³. NPRM, ¶ 2.

Because it is produced by the community for public purposes, however, rather than for profit, local PEG programming is fundamentally different than most other video programming addressed in the NPRM. Generated locally, at public expense, and minimal cost, it is more vulnerable to the potentially harmful impacts of regulation than nationally-marketed programming. Competition, the motivation behind the 1996 Act, is largely irrelevant as pertains to local PEG programming. The free market will not replace what is lost if inflexible regulation renders local PEG programming non-viable.

The GMTC and NATOA urge the Commission to realistically assess the practical implications of requiring local PEG programmers to include the costs of closed captioning in minimal budgets, and to categorically exempt local PEG programming and local PEG providers from closed captioning requirements. Responsive to the public as they must be to survive, local PEG programming entities and local governments will necessarily find alternatives to closed captioning, or caption voluntarily, if the need genuinely exists in their constituencies. If forced to closed caption generally, however, most local PEG programming entities will not survive.

Alternatively, the GMTC and NATOA request the commission to require only live, locally-produced public-interest PEG programming be captioned utilizing real time captioning methods.

* * *

III. DISCUSSION: LOCAL PEG PROGRAMMERS SHOULD BE EXEMPTED FROM CLOSED CAPTIONING REQUIREMENTS AS A CLASS.

The characteristics that distinguish local PEG programming also militate for exempting it from the Commission's proposed closed captioning mandates.

1. Congress Has Fashioned A Unique Role for Local PEG Programming

In its quest to make communications "available, so far as possible, to all the people of the United States, without discrimination,"⁴ Congress has long recognized the unique role of local public, educational, and governmental programming -- and endorsed it. PEG programming was accorded *sui generis* status under the Cable Act of 1984. In Title VI, as amended by the Telecommunications Act of 1996, franchising authorities are authorized to require the designation of channel capacity for PEG purposes as part of the cable franchising process.⁵ The Cable Act's provisions pertaining to commercial use expressly distinguish PEG channels from commercial uses.⁶ Under the rate regulation language added in the Consumer Protection and Competition Act of 1992 (the "1992 Act"), PEG channels must be carried on the basic tier.⁷ Many other provisions in Title VI, as amended, address PEG channels or programming particularly,⁸ and PEG's special status was preserved in the 1996 Act.

In short, every recent Congress has perceived PEG programming as a uniquely beneficial outgrowth of the evolution of television requiring special cultivation to thrive. Our lawmakers have correctly understood that local PEG programming must be handled differently than

⁴ Communications Act of 1934, 47 U.S.C. 151, et seq, Prologue.

⁵ 47 U.S.C. § 531.

⁶ 47 U.S.C. § 551.

⁷ 47 U.S.C. § 535.

⁸ 47 U.S.C. §§ 541, 542, 543, 545, 555, 557, among others)

commercial programming operations.

2. Local PEG Programming Depends Upon Limited Resources

PEG programming is non-commercial. It is not supported by advertising. It is carried on channels provided in accordance with Title VI by local cable operators, and supported financially either with franchise fees, public funds, or charitable donations. Although pay-per-view viewers may purchase their programs, this is the one instance in which our society has determined that a service otherwise provided commercially, deserves this sort of up-front support. And since its almost organic evolution out of the uniquely American landscape, it has proved its value. Indeed, as one cable industry representative put it, local PEG programming "is our national heritage to lose."⁹

Yet while it has proved its value, it has not developed the financial independence and viability that cable programming or the broadcast networks have. This may seem obvious, but it is critical to appreciating the impact that a requirement that local PEG programmers caption their productions could have. As the Commission has noted,¹⁰ the largest source of financial assistance available for closed captioning, the 40% provided by the Department of Education, is only available for programming that reaches the largest possible audiences, such as national news. It is therefore generally unavailable to local PEG programmers. Direct commercial support for closed captioning specifically, the next largest source of financial support, is also

⁹ Nancy Larkin, Vice President of Consumer Relations, Continental Cablevision as quoted in *Multichannel News*, January 27, 1997, page 57a.

¹⁰ NPRM, ¶ 10.

unavailable to public stations, which not only do not advertise, but generally, as a provision of their agreements with cable operators, are barred from accepting commercial support. This leaves the primary burden for funding any new regulatory obligations such as closed captioning squarely upon the public fisc.

The Commission has tentatively concluded that it should not exempt any class of provider "since all classes of providers appear to have the technical capability to deliver closed captioning to their viewers intact."¹¹ Conversely, however, local PEG entities clearly do not have the financial capability to provide closed captioning universally.

3. Local Government Resources Are Limited

Local public resources face many constraints. Many relate to the same changes in technology and competition in the communications industry that gave rise to the 1996 Act and this rulemaking. Indeed, the 1996 Act itself bars local governments from taxing direct-to home services.¹² As direct broadcast draws subscribers away from cable operators, the funds available for PEG programming from traditional sources may be expected to erode. In addition, in many states, local resources are under duress due to legislation

¹¹. NPRM, ¶ 6.

¹². 1996 Act, Section 602.

intended to advance telecommunications interests. For example, in Colorado, local governments are prohibited from charging fees for use of public rights-of-way by telecommunications companies,¹³ despite a hundred-year history of such a revenue stream. They are also banned from requiring the provision of in-kind services. Many states, including Colorado, have so-called Taxpayer's Bill of Rights laws, too, that is, legislation narrowing local taxing authority generally.

At the same time, local governments are being asked to provide services not necessary previously. The public expects local agencies to provide Internet access to government databases, advanced communications systems, emergency services -- all the modern accoutrements of the information revolution. GMTC and NATOA Members find themselves increasing spending simply to keep abreast of the information revolution.

So while local governments would like to offer every service possible to every constituency, we can expect increasing competition for scarce resources. In this context, to expect that PEG programming will be accorded first preference is unrealistic.

4. PEG Budgets Are Limited

It is no exaggeration to say that local PEG programming operates on a shoestring. PEG budgets are very modest when compared to the budgets of most of the other groups upon which closed captioning may be imposed. In order to provide the Commission with useful, up-to-date

¹³ Colorado Senate Bill 96-010 (April 12, 1996).

information for this rulemaking, the GMTC conducted a survey of its Members' PEG operations. NATOA circulated a survey on the Internet, and reviewed a recent study of PEG programming and production services.

GMTC Member respondents budgets range from \$0, for just over half the respondents, to \$510,000 annually, Denver's, the largest by a substantial margin. The mean budget *for those who have budgets* was just over \$100,000 per year, similar to NATOA respondents. Many Members who do not now produce programming are hoping to initiate it in the near future but are struggling with costs. Some with zero budgets produce a small amount of programming utilizing equipment provided by their cable operator under the terms of the franchise agreement, volunteer help, and employee time donated from other departments. (Note that even in PEG entities that have budgets, the average ratio of volunteers to paid employees is almost five to one.) As providers, they may recablecast programming produced by other nonprofit or governmental agencies at a nominal cost.

The City of Lakewood, a jurisdiction of nearly 140,000, for example, produces cablecasts of City Council meetings with cable company-provided equipment at a rate of about 6 live hours per month. All Lakewood's programming costs are absorbed in the community relations or "Outreach Department's" budget. Lakewood currently also produces one additional hour per month, a police program, called *Beyond the Badge*, utilizing staff resources. Lakewood hopes soon to increase its so-called CityWatch 8 programming by approximately three hours a month, a plan that could well be squelched with the imposition of the additional regulatory burden of closed captioning.

As a provider, the City of Lakewood also cablecasts programs on a cooperative basis for other nonprofit or governmental agencies. These include public interest programming from the local fire district and the urban drainage district, a live candidates' forum sponsored by the League of Women Voters, and, it is anticipated, a school/student produced program from the Jefferson County Public Schools in the near future. None of these organizations would be eligible, presumably, for DOE funding for closed captioning. None have closed captioning budgets. None receive income from commercial advertising related to their cablecasts, either for the original program or recablecast. Lakewood receives no compensation for carrying the programs on the PEG channels its cable operator provides in accordance with the Cable Act.

5. Few Requests/Voluntary Compliance

On the other hand, the City of Lakewood, on its own initiative, has advertised in three issues of its city-wide newsletter, soliciting interest for closed captioning or similar services and providing a telephone number for those who need such services. Yet Lakewood has not received a single call even inquiring about such services. Although other GMTC Member jurisdictions have similarly advertised publicly their willingness to find ways to accommodate the hearing impaired, only the City and County of Denver has received any responses or requests. NATOA's surveys of its Members turned up several requests for closed captioning or similar services *in larger jurisdictions*. In **each** such instance, however, the relevant PEG entity initiated some sort of closed captioning program voluntarily in response.

6. PEG Programmers Should Be Free to Weigh Costs/Benefits and Consider Alternatives

The City and County of Denver, in response to requests, has undertaken to closed-caption a substantial portion of its programming. However, its direct costs per hour of programming

amount to approximately \$130 per hour. The very cheapest closed captioning services it was able to find after extensive research cost \$120 per hour, also the cheapest rate the Commission's research discovered.¹⁴ Thus, the one GMTC Member who has received requests for closed captioning is doing so, but at a cost almost equal to the total production budget per hour of programming. Moreover, unlike commercial enterprises, PEG programmers do not gain additional revenue upon reshowing, and thus are unable to spread costs per production hour over several hours of recablecasting. Without advertising, they only incur additional expense upon recablecast, increasing the cost benefit ratio, not improving it.

If closed captioning is mandated across the board for all City and County produced programming, Denver, at least, will have to greatly increase its budget for closed captioning, and despite its role as one of the better-financed departments, in a status quo budget would have to decrease significantly the hours of original programming it provides its citizens. Presently, Denver offers only the "real time" or "live captioning" described in Paragraph 19 of the NPRM, the cheapest alternative according to the Commission's information. If it must now caption archived programming, or programming it receives from other PEG, non-profit or governmental agencies, the cost per hour will increase substantially, and the total cost for all its operations, exponentially.

As with most of the larger governmental programming agencies, a major part of the City and County of Denver's mission is production of staff (fire, police, employee) training videos, which may or may not be cablecast over the cable system. Should the very substantial additional

¹⁴ NPRM, ¶ 19.

cost of post-production captioning (estimated by the Commission at \$800 to \$2500 per hour) be added to these productions even if there are no hearing impaired employees in the given department? If there are hearing-impaired employees in the subject departments, it may be more economic and reasonable to provide signing, a service the City and County regularly arranges in other contexts, rather than quadruple or quintuple the cost of the production. The City and County of Denver has explored various alternatives for accommodating hearing impaired individuals, such as providing transcripts and signing on demand. Often these prove to be a better use of scarce local resources, and local jurisdictions ought to be permitted to determine how best to allocate taxpayer funds, instead of having the most expensive option mandated for them by the federal government.

7. Inhibiting Local PEG Programming Will Hurt Those Section 713 Seeks to Help

PEG programming is not just communication to the public. It is also communication by the public. That is, it represents an opportunity for many constituencies that otherwise would not be able to produce programming to have access on a grassroots level to the resources that will allow them to reach their own special groups and communicate their own specific concerns and interests. This includes the deaf and hearing impaired. PEG programming provides an opportunity for the very constituencies Section 713 is seeking to benefit that they would not have otherwise. So if closed captioning mandates effectively reduce PEG programming's availability significantly, they will not only kill the golden goose for other constituencies, but in part for the deaf and hearing impaired community as well.

8. Public Agencies Are Voluntarily Responsive

Local PEG Programmers are either public agencies or to some degree responsible to public agencies. As such they are intrinsically subject to the pressures of representative government and thus by nature more responsive than private corporations, particularly those headquartered half a continent away. A hearing-impaired individual dissatisfied with her ability to access local PEG programming may appeal in many cases to a local city council, a board of commissioners, or a cable board. All are accessible locally and very much subject to local control. In the GMTC survey, only one agency, the City and County of Denver, had received even one request for closed captioning, although several others have solicited interest in such services. Further, in response to its requests, indicatively, Denver initiated a study of closed captioning resources and found a way to provide closed captioning for much of its programming fairly cheaply. Respondents to the NATOA survey who had stimulated interest for closed captioning *all* initiated some sort of closed captioning. It is manifestly unnecessary, then, to impose closed captioning mandates on every small PEG entity where there may be no interest or no hearing impaired constituency simply in order to achieve the goal of adequate accessibility in jurisdictions where some demand exists.

IV. IN THE ABSENCE OF A CATEGORICAL EXEMPTION, ONLY CAPTIONING OF LIVE PROGRAMMING SHOULD BE REQUIRED.

If PEG programmers are not granted a general exemption from closed captioning mandates, the GMTC and NATOA would urge the Commission to require closed captioning only of PEG programmer-produced live programming, which can be captioned using real time stenocaptioning. Much programming provided by local agencies is acquired from other

organizations and recablecast over channels provided in exchange for use of public rights-of-way by the local cable operator. As such, the PEG or governmental agency has little control over the formulation of the acquired programming. Moreover, post-production closed captioning is considerably more expensive than live, real-time closed captioning, the cheapest of the alternatives. If PEG agencies are required to closed caption all programming they cablecast, whether they have produced it or not, they will be forced to reduce utilizing such services, or give up cablecasting outside programming. This will deprive many constituencies of an outlet for expression.

Assuming adequate resources are available and there is no rise in market cost due to increased demand, real time captioning may be available for as little as \$120 an hour. Since the immediate effect of Section 713's mandates may be expected to be an increase in demand prior to the development of additional service providers, the \$120 per hour cost may not last, but it is more manageable than the vastly more expensive options for non-live programming. Moreover, since public access shows are less likely to be recut to accommodate advertising, the captioning may be expected to continue to be exploitable for later casts, thus not necessitating additional expenditures upon recablecasting.

Requiring PEG programmers to caption staff training videos, even in the absence of any hearing impaired staffmembers would obviously be gratuitous regulation inconsistent with the Telecommunications Act of 1996's regulatory flexibility directives. Yet forcing PEG entities to caption programs in the absence of an external constituency would be equally senseless. Mandating video captioning of non-live local programming generally should not be permitted to kill the golden goose of local access programming for all constituencies.

V. OTHER ARRANGEMENTS INHERENTLY PROBLEMATICAL.

The Commission has considered, and the League for the Hard of Hearing has proposed basing determinations as to whether or not to require closed captioning of programming upon budget.¹⁵ If budget becomes the basis for determining whether closed captioning is required, and the League for the Hard of Hearing's proposed 10% standard is used, the GMTC and NATOA believe all their Members would be exempted. Not a single response to our surveys, calculating production costs many different ways, showed a production budget per hour of a multiple of ten times the cheapest rate estimated for closed captioning, that is \$120 per hour. Other closed captioning methods, with their higher costs, would *a fortiori* lead to exemption. Thus, if budget is to be used as the standard, PEG programmers should be broadly exempted from closed captioning requirements.

Yet using budget as a determinant has several inherent defects. Budget calculations tend to be approximate when one is talking about PEG or governmental programming. Does one factor in the salary of the head of the department that oversees the PEG facility, even if he or she has many other non-programming-related responsibilities? Would the Commission require PEG entities to factor in figures for volunteer time? How should budgets be reported, and what should be done to adjust for mid-year appropriations? Should every PEG agency in the United States report to the Commission monthly? Weekly? What accounting methods will be specified, and will the Commission ask local governments to change their methods of accounting to comport with its rules?

¹⁵ NPRM, ¶ 93.

If the regulatory requirements necessary to resolve these issues do not increase the Commission's costs, they will certainly increase local jurisdictions financial burdens. Better, far, to simply exempt PEG programmers as a class. A PEG programmer is easily identifiable by its non-profit, governmental and non-commercial status. The Commission should seek to establish clear, easily understood legal standards.

VI. ADDITIONAL IMPLICATIONS OF COSTS

As discussed, mandating closed captioning upon public agencies causes collateral costs, in addition to the costs of closed captioning itself. For example, the City and County of Denver calculates that simply administering closed captioning services and tracking them adds five percent to the cost of closed captioning. Similarly, since Section 713(h) eliminates private rights of action, the Commission will presumably enforce any mandate it creates. As with rate regulation, or any other compliance program, additional administrative and legal costs should be anticipated in connection with enforcement.

Failure to account for, or provide funding for, mandatory closed captioning and all its related costs may well contravene the Unfunded Mandates Reform Act of 1995.¹⁶ Even if such action does not create constitutional problems or contravene the unfunded mandate law, however, it seems counterproductive and inconsistent with Congress' intent in enacting Section 713. Money wasted on compliance with complex regulations or to determine liability for closed captioning, or to litigate any such issues will simply result in further depletion of local PEG production budgets.

¹⁶ 2 U.S.C. § 1501 (1955).

It is difficult to avoid the apprehension that federally-imposed closed captioning mandates without corresponding funding will eviscerate local PEG programming. If that occurs, one must, with the 'faulty vision to see things only as they are,' anticipate that, 1) only well-financed commercial interests will have access to video programming, and 2) a multitude of voices and interests heard now through local PEG programming will be silenced. The programming that remains may well be more accessible to all, but it will surely be more homogeneous, less vital and less creative; we will all hear less variety of expression and understand less about our local communities.

VI. CONCLUSION.

In accordance with Congress' intent in adopting Section 713 of the 1996 Act, the Greater Metro Cable Consortium and the National Association of Telecommunications Officers and Advisors respectfully urge the Commission to exempt local PEG entities as a category from closed captioning mandates. In view of the limited resources available to support PEG programming, mandatory closed captioning would clearly be economically burdensome for local PEG programmers and providers. Moreover, local governments and PEG entities have demonstrated their willingness to accommodate deaf and hearing impaired constituencies voluntarily. They should be permitted to make cost/benefit decisions with public funds independently, especially as other alternatives may prove preferable to having closed captioning requirements imposed on all communities without regard to their size, financial condition or the presence of hearing impaired communities within their jurisdictions.

If the Commission determines it inappropriate to leave determinations regarding closed captioning to local governments and PEG entities, the GMTC and NATOA would urge it to require PEG programmers to caption only live, community programming by means of stenocaptioning. It is important that the Commission draw clear lines in this rulemaking so that closed captioning does not become a regulatory morass into which local PEG programming collapses.

If local PEG programming is vitiated as a result of this rulemaking, that will detrimentally impact deaf and hearing impaired constituencies, along with many other constituencies. Our nation as a whole will be deprived of the great benefit of local PEG programming, and access to a variety programming types and capabilities. It would be a shame if laws designed in part to make the benefits of this special class of programming more accessible to one constituency instead made it unavailable to all.

Respectfully submitted,
GREATER METRO CABLE CONSORTIUM



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